U.S. Department of Labor

Office of Administrative Law Judges
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CASE NOS. 2001-LHC-01242
2001-LHC-01243
2001-LHC-01244

OWCP NOS. 01-148066
01-148067
01-148068

In the Matter of

LEO AMERO
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insurer

Appearances:

Scott N. Roberts, Esquire, Groton, Connecticut,
for the Claimant

Edward W. Murphy, Esquire (Morrison, Mahoney &
Miller), Boston, Massachusetts, for the Employer

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This proceeding arises from claims for worker's compensation benefits filed by Leo Amero (the Claimant) against the Electric Boat Corporation (the Employer), under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the Act). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs (OWCP), the matter was referred to the Office of Administrative Law Judges for a formal hearing which was conducted before me in New London, Connecticut on October 16, 2001, at which time all parties were given the opportunity to present

evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer. The Claimant testified at the hearing, and documentary evidence was admitted at the hearing without objection as Claimant's Exhibits CX 1-8, Employer's Exhibits RX 1-4 and Joint Exhibit JX 1. TR 6-8, 12, 68.[1] At the close of the hearing, the record was held open for a period of 60 days to allow the parties to offer deposition testimony from medical witnesses. TR 71. The post-hearing time frame was subsequently extended at the Claimant's request, and the parties have now submitted the following evidence which has been admitted without objection:

Deposition of Dr. Robert Moskowitz dated 11/19/01	RX 5
Deposition of Dr. S. Pearce Browning, III dated 12/10/01	CX 9

The parties waived closing argument, TR 71, and the record is now closed.

After careful analysis of the evidence contained in the record I conclude that the Claimant is entitled to an award of permanent partial disability compensation under the Act for the partial loss of use of his right arm, left foot and both legs, interest on unpaid compensation, medical care and attorney's fees. My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

At the hearing, the parties offered the following stipulations: (1) that the Claimant sustained injuries to his left foot and right upper extremity on February 15, 1990, his right leg on May 14, 1993 and to his left leg on July 30, 1993, and that all of these injuries occurred at 75 Eastern Point Road in Groton, Connecticut;[2] (2) that the parties are subject to the Act; (3) that an employer-employee relationship existed at the time of the accident; (4) that the Employer was given timely notice of the injuries; (5) that the Employer gave timely notification of the injuries to the Secretary of Labor and filed

[1] Documentary evidence will be referred to herein as "CX" for an exhibit offered by the Claimant, "EX" for an exhibit offered by the Employer, "JX" for a joint exhibit, and "ALJX" for the formal papers. References to the hearing transcript will be designated as "TR".

[2] 75 Eastern Point Road, Groton, Connecticut is the mailing address used by the Employer. ALJX 2.

a timely notice of controversion; that an informal conference was conducted on November 17, 2000;[3] (6) that medical benefits were paid for the injuries; (7) that the Claimant was paid $1,858.08 in temporary total disability compensation for the left foot injury; and (8) the Claimant's average weekly wage at the time of the left foot and right upper extremity injuries was $360.95 and $378.50 at the time of his leg injuries. JX 1. The parties also stipulated that the unresolved issues are (1) whether the Claimant's injuries arose in the course and within the scope of his employment and (2) the nature and extent of any disability resulting from the injuries. *Id.*

III. Summary of the Evidence

A. The Claimant's Testimony

The Claimant testified that he was born on December 5, 1937 and is married with three adult daughters. He is a high school graduate (1956) and studied graphic design for two years at the college level. He spent two years in the Navy on a submarine and continued his career in submarines by going to work for the Employer in 1962 at the Employer's shipyard in Groton, Connecticut. TR 17-18.

His first eleven years at the shipyard were spent as an outside machinist, working on submarines under construction and using a variety of hand tools, grinders and lathes. TR 18-19. In 1973, he became an inspector doing quality control and mechanical inspections aboard the submarines. TR 20-21. About 99 percent of his time as an inspector was spent aboard submarines. TR 22. He worked for the Employer as an inspector until December 1999 when he accepted a buy-out package and retired at the age of 61. He has not worked since. TR 20-21.

The Claimant testified that he injured his right Achilles tendon at work in 1985 when he mis-stepped off of a plank at work. He was seen by a Dr. Derby who kept him out of work for three months and treated him with an equine medication that provided some relief. He returned to work after three months, but said that his right foot was never the same after this injury. TR 23-26.[4]

On February 15, 1990, the Claimant suffered injuries to his left foot and Achilles tendon and his right shoulder when he slipped and fell while descending a ladder into a graving dock at work. TR 26-27. He said that he went to the Employer's Yard Hospital where he reported the injuries and was referred to Dr. Derby for treatment. Dr. Derby prescribed physical therapy and medication, and the Claimant testified that he made attempts to return to work on reduced duties

[3] The parties' stipulations were handwritten at the hearing on a stipulations form, and they wrote "11/17/01" for the date of the informal conference. JX 1. This is an obvious error as it postdates the hearing, so I have construed the parties' stipulation as 11/17/00 as the date of the informal conference.

[4] The 1985 right ankle injury in not part of the claims before me in this matter. TR 23.

between February and May 1990, but was unable to tolerate the walking and climbing due to left ankle pain. TR 27-29. He said that Dr. Derby eventually released him to return to work in May 1990 on light duty, but the Employer did not follow through with restricted assignments. TR 32-34. He stated that his ankle and shoulder were not 100 percent after he returned to work in that he still experienced left ankle pressure while walking and right shoulder pain climbing ladders. TR 32-33.

The Claimant testified that he suffered a third injury at work on May 14, 1993 when he fell while attempting to lower himself through a hatch on a submarine. He stated that his right shoulder gave out and that he injured his right knee when it struck a metal object during the ensuing fall. TR 35-36. He initially did not report this injury to the Employer, although the fall was witnessed by other employees and a union steward, because he did not want to lose any work time. However, the knee got worse, and his wife insisted that he report the injury which he did on June 4, 1993. TR 37. He stated that the Yard Hospital advised him to see Dr. Derby who prescribed medication which helped with the knee pain. He did not recall whether Dr. Derby set any limitations on his work activities or whether he lost any work time as a result of this injury. TR 38-39.

Two months later, on July 30, 1993, the Claimant testified that he fell again at work, this time when he attempted to step between a dock and a pontoon while inspecting a submarine. He said that he injured both knees and his right shoulder in the fall and went to the Yard Hospital with his supervisor. He further stated that his left leg was bleeding and that he passed out twice from the pain. He was initially treated by Dr. Derby who later referred him to Dr. Browning. TR 39-41.

The Claimant testified that he has seen Dr. Browning several times in regard to all of his injuries, and they discussed surgery for the left knee which he declined because he was able to get around taking Indocin which he still takes daily. TR 41-43. Regarding his current condition, the Claimant said that his left Achilles tendon is worse today than in the past, and he said that he can no longer ride a bike or walk as much. He further stated that he suffers from inflammation, that he limps for two days after mowing his lawn, that he cannot stand on a ladder to paint his house and that he has gained 15 pounds since his retirement 1999. TR 44. He said that he has experienced increased pain in his right shoulder since his retirement and can no longer throw a ball. He said that his right knee also becomes inflamed and painful with activity. TR 45-46. He attributed that right knee problems to the fall in May 1990, the left Achilles and right shoulder problems to the February 1990 injuries and the left knee problems to the July 1993 fall at work. TR 46-48. He denied suffering any injuries outside of work. TR 48.

On cross-examination, the Claimant testified that he continued to perform his inspection duties after the injuries, and he performed those duties, including climbing ladders and crawling, until his retirement in December 1999. TR 51-52, 54, 56-57, 59. He stated that his current physical activities consist mowing his half acre lawn with a hand mower, helping his wife with flower and vegetable gardens, swimming once or twice a week in contrast to two or three times weekly ten years ago, and shoveling snow for 15 to 30 minutes at a time. TR 60-65. He swims

65 laps and said that approximately ten laps are freestyle, using an overhead stroke. TR 64. On redirect, he testified that although he had returned to work without formal limitations after his injuries, his supervisors did make informal accommodations such as not assigning him inspection work in tanks and other tight spaces. TR 65-66. However, he added that the Employer had a limited number of inspectors and that "[i]f you don't do the job, then you're out of work or whatever." TR 66.

B. Medical Evidence[5]

1. Yard Hospital Records

The Claimant introduced records from the Employer's Yard Hospital which show that he was seen on February 15, 1990 after he reported slipping off of a ladder at work. The record reflects that he complained of pain in the left Achilles tendon, and he was diagnosed with a strain. CX 2. He was seen for a follow-up six days later, at which time he also complained of right shoulder pain, and he was diagnosed with acromoclavicular and Achilles tendinitis. *Id*. Additional Yard Hospital records introduced by the Employer reflect that the Claimant was out of work for three periods – from February 16, 1990 to February 19, 1990, From April 13, 1990 to April 29, 1990 and from May 12, 1990 to May 28, 1990 – following this injury. RX 1 at 65-67.

The Yard Hospital records further show that the Claimant was seen again on June 4, 1993 when he reported pain in swelling in his right knee after hitting the knee on the side of a hatch on May 14, 1993. He was seen again for this injury on June 8, June 9 and June 17, 1993, and his referral to Dr. Derby for treatment is noted. CX 4. Finally, the Yard Hospital records reflect that the Claimant was seen on July 30, 1993 when he reported multiple injuries after falling between a dock and a pontoon. On examination, abrasions and contusions were observed on his right shin, left knee and left palm and left shoulder. CX 6.

2. Dr. Derby

Dr. Derby's records date to November 17, 1977 when he saw the Claimant for complaints of headaches, back and shoulder pain which the Claimant attributed to an accident at work on February 20, 1976 when a 20 foot metal railing reportedly fell on his back and head. Dr. Derby's diagnosis was cervical spine syndrome. RX 4 at 1. Dr. Derby continued to follow the Claimant for this condition, and his office notes reflect that the Claimant continued to report neck and left shoulder pain with no improvement two years after the injury. *Id.* at 2-4.

The records from Dr. Derby next indicate that he began seeing the Claimant for recurrent right ankle tendinitis in January 1980. *Id.* at 5-7, 9. In May 1982, and again in April 1983, the

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[5] The record includes a report of an evaluation performed in November 2000 by John J. Giachetto, M.D. which is limited to assessment of the Claimant's right ankle which is not involved in these claims. RX 3. Accordingly, it has not been discussed.

Claimant reported continuing pain in the left side of his neck and left shoulder blade, and he reportedly stated that the pain had caused him to limit activities such as chopping wood. As of the April 1983 visit, Dr. Derby wrote that he considered the Claimant's condition to be clinically worse. *Id.* at 8. In May 1983, Dr. Derby stated that the Claimant reported no change in his neck condition, and he wrote that had increased his disability to ten percent. *Id.* at 9. In May 1985, the Claimant saw Dr. Derby for a reevaluation of his right ankle in light of discomfort and limping which he developed after running, and in August 1985, the Claimant reported injuring his right foot while working in a valve. *Id.* at 10-11.

On February 21, 1990, the Claimant reported left foot and right shoulder pain after slipping off of a ladder at work on February 15, 1990. As of April 16, 1990, the Claimant stated that he still had pain in the left heel and right shoulder, although the right shoulder was a little better. *Id.* at 13. On May 14, 1990, the Claimant reported recurring left ankle pain after slipping and twisting his ankle at work. Dr. Derby prescribed medication and "channels" to be worn inside the Claimant's boots, and in June 1990, he gave the Claimant a note that he should ride to and from the gate at work. *Id.* at 14. The last entry from Dr. Derby is dated June 16, 1993 when the Claimant was seen with a complaint that he had struck his right knee while going down a hatch at work one month earlier. Dr. Derby diagnosed the condition as a contusion and sprain of the medial collateral ligament. *Id.* at 12.

3. Dr. Browning

The Claimant also introduced records from S. Pearce Browning, M.D. CX 8. Dr. Browning first saw the Claimant on March 23, 2000, at which time he examined the Claimant and reviewed his occupational and medical histories and x-ray studies of the knees, ankles and right shoulder. He also ordered MRI studies of the knees and right shoulder. *Id.* at 1-3. In a letter dated September 27, 2000 to the Claimant's attorney, Dr. Browning stated that he had reviewed the reports of the MRI studies which were received in evidence as CX 8. He stated that based on the Claimant's history, physical examination and the MRI report, he would assign a 12 percent permanent partial impairment rating to the right arm due to the right shoulder injury. He noted that there were changes in both the AC joint and rotator cuff, and he stated that future surgery may be required though he did not recommend surgery at that time. With regard to the Claimant's knees, Dr. Browning stated that there was extensive damage to the medial and collateral compartments and the patella femoral joint, a tear in the left medial meniscus and a possible tear in the right medial meniscus. Based on these findings, he assigned a 12 percent permanent partial impairment rating to each leg, but he cautioned that the greater likelihood is that the Claimant's knees will continue to deteriorate to the point where he will require bilateral knee replacement which would produce a permanent impairment rating in the 35 percent to 50 percent range, depending on the quality of the outcome. Finally, Dr. Browning stated that he did not believe that the Claimant had reached a point of maximum medical improvement because "[i]f anything, he is going to get gradually and progressively worse, and he will continue to require ongoing treatment." *Id.* at 7-8.

Dr. Browning's testimony was taken at a post-hearing deposition on December 10, 2001. CX 9. Dr. Browning testified that he has been board-certified in orthopedics since 1965 and that his practice concentrates on the hands. *Id.* at 4. He discussed his evaluation of the Claimant and stated that he disagreed with Dr. Moskowitz, whose opinions are discussed *infra*, that the Claimant's right shoulder problems were not causally related to his work at the Employer because they could be completely attributed to degenerative arthritis, as opposed to traumatic injury. *Id.* at 7. In this regard, Dr. Browning explained that the Claimant had suffered a significant reported work injury which was serious enough to produce a compression fracture in the thoracic spine and significant damage to the right shoulder joint. He also noted that the Claimant had continued to work and age after the injury to his shoulder, so he agreed that degenerative arthritis played a role. However, he reiterated that the shoulder condition began with an injury, and he stated that it is his opinion that the injury is responsible for a significant amount of the Claimant's current right shoulder problem. *Id.* at 8. Dr. Browning also addressed his impairment rating for the Claimant's right arm, and he testified that he based his assessment of a 12 percent permanent partial impairment on a combination of the AMA Guides to the Evaluation of Permanent Impairment and partially on his experience. He explained that he does not rely exclusively on the AMA Guides because they deal with range of motion but not rotator cuff or AC joint problems. *Id.* at 11-12. Dr. Browning further testified that he based his 12 percent impairment ratings for the Claimant's legs on his physical examination and the presence of torn cartilages, collapse or narrowing of the medial compartments and progressive degeneration. *Id.* at 13. He stated that his diagnosis for the Claimant's knees is torn medial menisci, which were documented by the MRI, with progressive degeneration of the medial compartments which one sees with a damaged meniscus and many years of wear. *Id.* Dr. Browning also testified that he has assigned a seven percent impairment rating to the Claimant's left ankle based primarily on pain and discomfort. *Id.* at 14-15. Dr. Browning further testified that he did not believe that the Claimant is a candidate for shoulder or knee surgery at the present time, but he stated that he might need shoulder surgery in the future and will likely require knee replacement if he lives long enough because his knees are steadily going downhill. *Id.* at 13-15.

On cross-examination, Dr. Browning stated that he considered it to be perfectly reasonable to assign impairment ratings in cases where the patient has not reached maximum medical improvement. He explained that the ratings he assigned to the Claimant represented the level of impairment at that point in time, and he stated that the Claimant was only going to get progressively worse, not better. *Id.* at 16-17. Dr. Browning testified that he was not aware that the Claimant swims, and he was not aware of the Claimant's activities in and around his home. *Id.* at 22-23. Regarding his impairment ratings, Dr. Browning stated that his seven percent rating for the Claimant's left foot and ankle is separate from the impairment rating that he assigned to the left leg based upon the knee injury. *Id.* at 24. He reiterated his opinion that the Claimant has not reached a point of maximum medical improvement because the Claimant's condition is going to get progressively worse, and he will continue to require ongoing treatment. *Id.* at 24-25.

On redirect, Dr. Browning clarified that there is a distinction between maximum medical improvement and medical endpoint in that the Claimant presently is as good as he is going to get, while his medical endpoint may be knee replacement surgery. *Id.* at 25-26. He also stated that

swimming, including use of an overhead or "freestyle" stroke, is therapeutic for shoulder injuries such as the Claimant's. Finally, Dr. Browning was asked whether the Claimant's work activities for the Employer could contribute to or aggravate a pre-existing degenerative arthritic condition. He responded that the Claimant's work aboard submarines, especially crawling, squatting and kneeling with the knees in a flexed position, would tend to aggravate torn cartilage and that such repetitive activities over the course of many years would damage the knees. *Id.* at 28-29.

4. Dr. Moskowitz

Robert Moskowitz, M.D. examined the Claimant at the Employer's request on April 27, 2001. He reviewed the Claimant's medical history and the x-ray and MRI reports, and he conducted a physical examination. RX 2 at 1-2. He concluded that the Claimant has an obvious problem with his knees but stated that it was difficult for him to see how his knee problems are related to work injuries. He noted that the Claimant had not lost time from work following the injury in 1990 and that he had continued to work after this injury until his retirement in 1999. He stated that the Claimant had degenerative arthritis which was not either caused by or aggravated by the 1990 injury, and it was his opinion that the Claimant's degenerative arthritis existed prior to any work-related injury and that the Claimant's disability involving his knees was also pre-existing. *Id.* at 3.

Dr. Moskowitz further stated that the Claimant suffered an injury to his right shoulder in 1985, but he had continued to work until 1999 and did not show much in the way of physical findings at the time of his examination in 2001. He noted that there was full range of motion with crepitation, and he stated that the degenerative changes in the Claimant's AC joint are similar to the changes in the Claimant's knees and are similarly not work-related. He further stated that the MRI "certainly could be just age-related" and that it was difficult to assign any permanency rating to the right shoulder for two reasons: (1) there were no objective criteria on physical examination upon which to base a rating; and (2) it was difficult to attribute the x-ray and MRI findings to the 1985 injury because the Claimant had continued to work for 15 more years at which, Dr. Moskowitz assumed, was a "fairly aggressive job." *Id.* at 3. Finally, Dr. Moskowitz stated that he agreed with Dr. Giachetto's seven percent rating for the Claimant's right ankle. *Id.* It appears that he did not consider the Claimant's left ankle.

At a deposition taken on November 19, 2001, Dr. Moskowitz testified that he has been board-certified in orthopedic surgery since 1974 and that, while trained as a general orthopedic surgeon, he has concentrated on spine, total joint and fracture surgery. RX 5 at 5. Dr. Moskowitz was asked whether the Claimant's May 14, 1993 accident in any way caused, contributed to, hastened or aggravated the Claimant's current right knee impairment, and he was asked to assume the following facts: first, that the Claimant was injured at work on May 14, 1993 when his left shoulder let go while he was climbing into a hatch and struck his right knee on metal; second, that he did not go to the Yard Hospital until June 4, 1993, hoping that the pain would subside on its own; third, that the Claimant saw Dr. Derby once on June 16, 1993 at which time Dr. Derby noted minimal swelling and diagnosed a contusion and requested that the Claimant come back in three weeks if he was not better; and fourth, that the Claimant did not miss any time

from work and continued to perform his regular duties, including climbing ladders and crawling with discomfort, until his retirement in 1999. *Id.* at 8-9.[6] Dr. Moskowitz responded that it is his opinion that the May 14, 1993 accident had nothing to do with the Claimant's right knee condition. *Id.* at 9-10. He further testified that he arrived at this opinion because the record does not suggest that the Claimant suffered a significant injury which would have required more treatment than he received from Dr. Derby and because the Claimant was able to perform his job for many years after the accident. *Id.* at 10. He stated that he agreed with Dr. Browning that the Claimant has an impairment of his right knee, and he stated that it is his opinion that degenerative arthritis is the cause of the impairment based on the x-ray findings. *Id.* at 10-11.

Dr. Moskowitz was next asked whether the Claimant's July 30, 1993 injury at work in any way caused, hastened or aggravated his current left knee impairment assuming the following facts: first, that the Claimant stepped off of a dock on July 30, 1993 and landed on both knees between the dock and a pontoon; second, that the Claimant walked one quarter mile to the Yard Hospital in severe pain, possibly passing out on one or two occasions; and third, that the Claimant missed three days from work and returned to his regular duties, including climbing ladders and crawling, albeit with discomfort, until his retirement in 1999. *Id.* at 11. Dr. Moskowitz responded that, similar to his opinion regarding the Claimant's right knee, he did not believe that the Claimant's present left knee condition is related to the July 30, 1993 injury because the Claimant was only seen at the yard hospital and never followed-up with a medical doctor, which indicated that the injury was minor. *Id.* at 12. He also stated that he agreed with Dr. Browning that the Claimant has an impairment of his left knee, and he stated that it is his opinion that degenerative arthritis is the cause of the impairment based on the x-ray findings. *Id.* at 12-13.

Dr. Moskowitz was asked whether the Claimant's February 15, 1990 accident in any way caused, contributed to or aggravated his present right arm or shoulder condition assuming the following: first, that he slipped off of a ladder on February 15, 1990, causing all of his weight to be placed on his right arm and shoulder; and second, that he missed no time from work as a result of this injury and continued with his usual duties, which included going up and down hatches and climbing ladders, until his retirement in 1999. *Id.* at 13. He answered that it is his opinion that the Claimant's February 15, 1990 is not contributory to his present condition because "an injury that would lead to something significant over the years . . . should have incapacitated him for at least some period of time after his injury, which apparently it did not." *Id.* at 14. He also observed that there were not a "significant number" of medical visits for treatment following this injury. *Id.* Dr. Moskowitz agreed with Dr. Browning that the Claimant has some degree of impairment affecting his right arm and shoulder but said that he questioned whether the impairment is 12 percent, as opined by Dr. Browning. Initially, Dr. Moskowitz was unable to be more specific, stating that he would "have to look into his capabilities at this time, which I don't

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[6] The Claimant objected to this and other similar questions on unspecified grounds. *Id.* at 9. Assuming that the objections are based on the contention that the question assumes facts not in evidence, it is overruled. If Dr. Moskowitz based his answers on erroneous assumptions, this will be taken into consideration in determining how much weight to assign to his opinions.

know if I got particularly involved [with] in my examination." *Id.* at 15. However, when asked to assume that the Claimant is able to swim weekly and that some of his swimming is done with a freestyle stroke, Dr. Moskowitz testified that this activity is not totally consistent with what the Claimant told him during his examination, and he "[b]ecause of that inconsistency" he would give the Claimant a disability rating in the neighborhood of three to four percent based on the x-ray and some mild loss of range of motion. *Id.* at 16.

Lastly, Dr. Moskowitz testified that he believes that there is a relationship between the Claimant's present impairment involving left ankle or foot and the February 15, 1990 injury at work assuming that the Claimant injured his left foot on that date, reported the injury that same day and missed three months of work, and subsequently returned to his regular duties which involved climbing ladders and crawling. *Id.* at 16-17. He stated that he based this opinion on the fact that the Claimant suffered a significant injury and had multiple medical visits over time. *Id.* at 17.

On cross-examination, Dr. Moskowitz stated that he had "no problem" with applying Dr. Giachetto's seven percent impairment rating for the Claimant's right ankle to the left side, and he also stated that he had "no basic disagreement" with Dr. Browning's assessment of a 12 percent impairment of the Claimant's right knee. *Id.* at 18. Dr. Moskowitz further testified that degenerative arthritis involves a wearing out of cartilage which is primarily caused by a congenital misalignment of the joint. *Id.* at 19-20. He also stated that significant injuries such as a torn ligament, but not a torn meniscus according to current thought, could lead to degenerative arthritis over time, but he said that he was not aware of any studies that show a relationship between development of degenerative arthritis and a particular job. *Id.* at 20-21. He was then asked how he would have treated the Claimant following the May 14, 1993 right knee injury and whether it would concern him that the Claimant's job as an inspector required squatting, climbing and crawling in tight and confined spaces. Dr. Moskowitz responded,

> If I saw the arthritis, you know, and forgetting the injury. Let's just say I saw arthritis. I might say to him, you know, "This may" -- obviously when you have arthritis any activity could aggravate you. Not produce the arthritis or even I guess it's a question of the term "aggravate." But, I mean, if you're not active well, you have to walk -- it's an interesting question. You have to walk a fine line. Because people with arthritis will tell you that if they're inactive, it's going to bother them more. And also they'll tell you that if, you know, by the end of the day when they've been doing a lot, it will bother them more. So you kind of have to walk a fine line between not being too inactive and not being too active.

Id. at 22-23. Finally, Dr. Moskowitz stated that if he was the Claimant's treating physician, he might advise him to walk that "fine line". *Id.* at 23.

IV. Findings of Fact and Conclusions of Law

The basic controversy between the parties is whether any of the Claimant's conditions affecting his right arm and shoulder, his left foot and ankle and both knees are causally related to his employment. On this issue, the Claimant contends that while his degenerative arthritis may be a pre-existing process, conditions in his employment aggravated the arthritis, thereby making the resulting impairments compensable. TR 13-14. The Employer counters that none of the Claimant's conditions are employment related, noting that his accidents at work were fairly minor and were followed by brief periods of treatment and a return to work, substantially without restriction. Thus, the Employer maintains that the Claimant's current impairments are attributable to degenerative conditions caused by factors other than his employment. TR 14.

A. Causal Relationship

In view of the fact that Drs. Browning and Moskowitz have both offered medical opinions that the Claimant's left foot and ankle condition is causally related to his February 15, 1990 workplace injury and that it has produced a seven percent impairment, I find that there is no factual issue on this record regarding either the causation or the extent of the disability resulting from this condition. There also is no question presented as to the extent on the extent of the disability involving the Claimant's legs as Drs. Browning and Moskowitz both agreed that there is a 12 percent impairment of the right leg, and the Employer offered no evidence contradicting Dr. Browning's opinion that the Claimant has a 12 percent impairment involving his left leg.[7] On the other hand, there are factual issues regarding whether there is a causal relationship between the Claimant's knee and right arm and shoulder conditions, the extent of any disability involving the right arm and shoulder, and whether any of the Claimant's conditions are permanent in nature.

A claimant seeking benefits under the Act must, as a threshold matter, establish that he suffered an "accidental injury . . . arising out of and in the course of employment." 33 U.S.C. 902(2); *Bath Iron Works v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999) (*Brown*). A claimant need not show that he has a specific illness or disease in order to establish that he has suffered an injury under the LHWCA, but need only establish some physical harm; *i.e.*, that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 154 (2nd Cir. 1991). A claimant is aided in this regard by section 20(a) of the Act which creates a presumption that a claim comes within its provisions. 33 U.S.C. §920(a). The section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976) (*Swinton*), *cert. denied*, 429 U.S. 820 (1976). To invoke the presumption, there must be a *prima facie* claim for compensation, to which the statutory presumption refers; that is, a claim "must at least allege an injury that arose in the course of employment as well as out of employment." *U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, OWCP*, 455 U.S. 608, 615 (1982) (*U.S.*

[7] Dr. Moskowitz did not address the degree of impairment or disability with respect to the Claimant's left knee.

Industries). A claimant presents a *prima facie* case by establishing (1) that he or she sustained physical harm or pain and (2) that an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Brown*, 194 F.3d at 4, citing *Ramey v. Stevedoring Servs. of Am.*, 134 F.3d 954, 959 (9th Cir.1998) and *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149, 151 (1986). *See also Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984); *Kelaita v. Triple A. Machine Shop*, 13 BRBS 326, 331 (1981).

The Claimant testified that he suffered injuries while at work for the Employer which produced harm to his knees, his right arm and shoulder and his left ankle and foot. That these harms are related to his employment is further supported by the medical opinion of Dr. Browning. Based on my observations of the Claimant's demeanor at the hearing and the totality of this record, I find the Claimant's account of the his accidents at work to be credible, and I consequently conclude that he has successfully carried his burden of establishing a *prima facie* case that he suffered injuries arising out of and in the course of employment.

Where a claimant makes a *prima facie* showing of harm or pain and the existence of working conditions which could have caused or aggravated the harm or pain, the party opposing entitlement must produce substantial evidence severing the presumed connection between such harm and employment or working conditions. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2nd Cir. 1981). *See also Swinton*, 554 F.2d at 1082 (burden is on the employer to go forward with substantial countervailing evidence to rebut the presumption that the injury was caused by the claimant's employment); *American Grain Trimmers v. Office of Workers' Compensation Programs*, 181 F.3d 810, 815-17 (7th Cir. 1999) (*Grain Trimmers*); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 56 (1st Cir. 1997). Evidence is "substantial" if it is the kind of evidence a reasonable mind might accept as adequate to support a conclusion. *John W. McGrath Corp. v. Hughes*, 264 F.2d 314, 316 (2nd Cir. 1959), *cert. denied*, 360 U.S. 931 (1959). The Employer has offered the medical opinion of Dr. Moskowitz that, with the exception of the February 15, 1990 injuries to the left foot and ankle, the Claimant's accidents at work were too minor to have any relationship to his current disabilities which he instead attributed to pre-existing degenerative arthritis which is unrelated to employment conditions. In my view, Dr. Moskowitz's opinions on causation are sufficiently unequivocal to rebut the presumed connection. *See O'Kelley v. Department of the Army/NAF*, 34 BRBS 39, 41-42 (2000). Because the Employer has successfully rebutted the presumed connection between the Claimant's injury and his employment, the presumption "falls out" of the case; *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935); and the trier of fact must weigh all evidence of record and resolve any disputed facts based on the record as a whole. *Noble Drilling Co. v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986). As the proponent of an award of benefits in this matter, the burden of persuasion remains at all times on the Claimant. *Grain Trimmers*, 181 F.3d at 816-17, citing *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 271 (1994).

As summarized above, Dr. Browning based his opinion that the Claimant's right arm and shoulder condition is causally related to the February 15, 1990 workplace injury on his conclusion that the injury was serious enough to have produced evidence of a thoracic compression fracture. CX 9 at 7-8. Dr. Moskowitz took the opposite view that the February 15, 1990 injury was not

severe enough to have caused the Claimant's current condition because it did not appear to him that the Claimant was incapacitated by that injury. RX 5 at 14. Based on my review of the evidence, I find that a legitimate question can be raised as to how carefully either physician studied the medical records. That is, Dr. Browning appears to have assumed that the thoracic compression fracture occurred as a result of the February 15, 1990 slip off of the ladder when there is no contemporaneous medical evidence of any spinal injury. Rather, it would appear to be more likely, although not entirely clear from this record, that any compression fracture is related to the earlier February 20, 1976 accident when the Claimant was struck on the head and back by a metal railing that reportedly caused headache, backache, neck and *left* shoulder pain, and numbness in the hands. RX 4 at 1. For his part, Dr. Moskowitz appears to have overlooked the fact that the Claimant was incapacitated for three periods during three months following the February 15, 1990 accident which injured his right arm and shoulder as well as the left ankle and foot. RX 4 at 13-14, RX 1 at 65-67. I find this error by Dr. Moskowitz to be particularly significant since he acknowledged a relationship between the February 15, 1990 accident and the Claimant's current left ankle and foot condition primarily because the record showed that he missed time from work and required recurrent treatment. Although the Claimant's complaints following the February 15, 1990 accident concentrated on his ankle and foot, the fact that he continued to complain to Dr. Derby of right shoulder pain two months after the accident and his credible testimony that he continued to experience shoulder pain while climbing ladders after he returned to work persuades me that Dr. Moskowitz was mistaken in his assumption that the injury was minor and caused no lost time from work. Consequently, I have given little weight to his opinion that there is no causal relationship between the Claimant's right arm and shoulder condition and his employment. This leaves Dr. Browning's opinion which is also flawed by his apparently mistaken assumption that the February 15, 1990 accident caused a compression fracture of the Claimant's spine. Though troubling, I find that this error is less egregious than Dr. Moskowitz's mistaken assumptions because Dr. Browning was at least right in his belief that the injury was significant. While I am not free of any doubt on this issue, I do find on balance that it is more likely than not that the Claimant's current right shoulder and arm condition is causally related to the February 15, 1990 workplace accident. Therefore, I conclude that the Claimant has met his burden of proving without the benefit of the statutory presumption that he suffered a disabling injury to his right arm and shoulder which arose out of and in the course of his employment.

On the question of the cause of the Claimant's knee condition, Dr. Browning expressed the opinion that the Claimant's repetitive crawling, squatting and kneeling work activities for the Employer would tend to aggravate a pre-existing degenerative arthritic condition and, over the course of many years, would further damage the knees. CX 9 at 28-29. Dr. Moskowitz initially disagreed and attributed all of the Claimant's current knee problems to degenerative arthritis that he said was caused by congenital factors that are unrelated to the Claimant's employment. RX 5 at 19-21. However, when pressed on cross-examination, he conceded that any activity can obviously aggravate degenerative arthritis, and he stated that patients who suffer from degenerative arthritis must walk a "fine line" between too much activity and too little. *Id*. at 22-23. It is well-established that a work-related aggravation of a pre-existing condition qualifies as an injury within the meaning of the Act; *Preziosi v. Controlled Indus*tries, 22 BRBS 468, 470

(1989); and where an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513, 517 (5th Cir. 1986); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-15 (9th Cir. 1966). Moreover, the "fact that a congenital condition may contribute to the gravity of the injury does not affect a claimant's right to recover under the Act." *John W. McGrath Corp. v. Hughes*, 289 F.2d 403, 405 n.1 (2nd Cir. 1961) citing *Grain Handling Co. v. Sweeney*, 102 F.2d 464 (2nd Cir. 1939), *cert. denied*, 308 U.S. 570 (1939). Based on Dr. Browning's opinion that the Claimant's work activities tended to aggravate his knee condition, and Dr. Moskowitz's agreement that the Claimant's work activities could have aggravated his pre-existing degenerative arthritis, I find that the Claimant has met his burden based on the totality of record evidence of establishing that he suffered disabling injuries to his knees which arose out of and in the course of his employment.

B. Nature and Extent of the Claimant's Disabilities

1. Nature of the Disabilities – Temporary or Permanent

The Claimant seeks compensation under section 8(c) of the Act for the partial loss of the use of his legs, left foot and right arm due to his injuries. Since section 8(c) compensation is paid in cases of permanent partial disability, the Claimant must establish that his functional losses are permanent in nature. Drs. Browning and Moskowitz both appear to have assumed that all of the Claimant's disabilities are permanent because they assigned him permanent impairment ratings. Although Dr. Browning also stated that he does not believe that the Claimant has reached a point of maximum medical improvement from his injuries, he later clarified that he meant that the Claimant had not reached a medical end point because he will continue to deteriorate and will require medical treatment in the future. Based on the medical evidence which shows that the Claimant had reached a point a maximum medical improvement from all of his work-related injuries by the time that he was evaluated by Dr. Browning on March 23, 2000 (CX 7), I find that any disability resulting from his work-related injuries has been permanent in nature since that date. *Morales v. General Dynamics Corp.*, 16 BRBS 293, 296 (1984) (appropriate to find that maximum medical improvement has been reached where disability will be lengthy, indefinite in duration and lack a normal healing period), *aff'd in pertinent part sub nom Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66 (2nd Cir. 1985).

2. Extent of Disability

Having determined that the Claimant's disabilities are permanent, I must now address the extent of the extent of his disabilities, or more precisely, the extent of his loss of use.

a. Legs

Based on the Claimant's knee injuries, Dr. Browning assigned a permanent impairment rating of 12 percent for each leg. Dr. Moskowitz stated that he had no problem with Dr. Browning's rating based on the right knee, and no evidence has been introduced to contradict Dr.

Browning's rating for the left leg. Accordingly, I find that the uncontroverted medical evidence establishes that the Claimant has suffered a 12 percent permanent partial loss of the use of each leg.

b. Left Foot

Dr. Browning determined that the Claimant has suffered a seven percent permanent impairment of his left foot due to the February 15, 1990 injury to his left foot and ankle, and he stated that his finding of an permanent impairment of the left foot is separate from his impairment ratings for the Claimant's legs which are based upon his knee injuries. Dr. Moskowitz agreed with this assessment. Accordingly, I find that the uncontroverted medical evidence establishes that the Claimant has suffered a seven percent permanent partial loss of the use of his left foot.

c. Right Arm

Dr. Browning assigned a 12 percent permanent partial impairment rating to the Claimant's right arm due to his right shoulder injury. He based this assessment in part on the AMA Guides to the Evaluation of Permanent Impairment and partially on his experience because the AMA Guides deal with range of motion but not rotator cuff or AC joint problems. Dr. Moskowitz disagreed with this rating, noting that the Claimant's current practice of swimming with an overhead stroke is inconsistent with the information the Claimant provided during his examination. Based on the x-ray findings and the evidence of some mild loss of range of motion, Dr. Moskowitz stated that he would rate the Claimant's impairment in the range of three or four percent. In weighing these conflicting opinions, I find it noteworthy that Dr. Browning testified that he was not aware of the fact that the Claimant swims, nor was he aware of the Claimant's activities in and around his home. CX 9 at 22-23. Although he did consider the Claimant's swimming, Dr. Moskowitz similarly conceded that he was not familiar with the Claimant's current capabilities in terms of the use of his arm. RX 5 at 15. Under these circumstances, where I am unable to completely credit either of the competing opinions, I find it reasonable to arrive at a compromise loss rating of 7.75 percent which represents the midpoint between Dr. Browning's 12 percent impairment rating and Dr. Moskowitz's estimate of a three to four percent loss. *See Peterson v. Washington Metro. Area Transit Auth.*, 13 BRBS 891, 897 (1981) (within the administrative law judge's discretion to assess a degree of disability different from the ratings found by the physicians if that degree is reasonable).

C. Compensation Due

Section 8(c) of the Act provides a compensation schedule, which is based on 2/3 of a worker's average weekly wage multiplied by a specified number of weeks, for the loss of enumerated body parts. In the case of the loss of an arm, section 8(c)(1) provides for 312 weeks of compensation. 33 U.S.C. §908(c)(1). For the loss of a leg, section 8(c)(2) provides for 288 weeks of compensation. 33 U.S.C. §908(c)(2). And, section 8(c)(4) provides for payment of 205 weeks of compensation for the loss of a foot. 33 U.S.C. §908(c)(4). In a case such as this where the loss or loss of use is partial, compensation is based on the proportionate loss or loss of use of the member. 33 U.S.C. §908(c)(19). That is, the percentage of the Claimant's loss of use of his right arm, legs and left foot must be applied to the number of weeks set forth in the corresponding subsection of section 8(c) for total loss to arrive at the proportionate number of weeks of compensation. *Nash v. Strachan Shipping Co.*, 15 BRBS 386, 391-92 (1983), *aff'd in relevant part but rev'd on other grounds*, 760 F.2d 569, (5th Cir. 1985), *aff'd on recon. en banc*, 782 F.2d 513 (1986). For the partial loss of his right arm, 312 weeks is multiplied by .0775 (the percent of loss) to arrive at 24.18 weeks of compensation entitlement which shall be paid at 2/3 of the stipulated average weekly wage of $360.95. For the partial loss of his left foot, 205 weeks is multiplied by .07 (the percent of loss) to arrive at 14.35 weeks of compensation entitlement which shall also be paid at 2/3 of the stipulated average weekly wage of $360.95. Finally, for the partial loss of the use of each of his legs, 288 weeks is multiplied by .12 (the percent of loss) to arrive at 34.56 weeks of compensation entitlement for each leg which will be paid at 2/3 of the stipulated average weekly wage of $378.50. Pursuant to section 8(c)(2), these awards of compensation will run consecutively. 33 U.S.C. §908(c)(22).

D. Interest on Unpaid Compensation

Although not specifically authorized in the Act, the Benefits Review Board and the Courts have consistently upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228-30 (5th Cir.1971); *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *rehearing denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979); *Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989). Interest is due on all unpaid compensation. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989). The Board has also concluded that inflationary trends in the economy render use of a fixed interest rate inappropriate to further the purpose of making claimant whole, and it has held that interest should be assessed according to the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982) which is the rate periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). My order incorporates 28 U.S.C. §1961 (1982) by reference and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

E. Medical Care

An Employer found liable for the payment of compensation is additionally responsible pursuant to section 7(a) of the Act for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988). Accordingly, I find that the Employer is liable for all reasonable and necessary medical care as required by the Claimant for treatment of his work-related right shoulder and arm, left ankle and foot and bilateral knee injuries.

F. Attorney's Fees

Having successfully established his right to compensation, the Claimant is entitled to an award of attorneys' fees under section 28(a) of the Act. *American Stevedores v. Salzano*, 538 F.2d 933, 937 (2nd Cir. 1976). In my order, I will allow the Claimant's attorney 30 days from the date this Decision and order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. §702.132, and the Employer and Carrier will be granted 15 days from the filing of the fee petition to file any objection.

V. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

1. The Employer, Electric Boat Corporation, shall pay to the Claimant, Leo Amero permanent partial disability compensation benefits pursuant to 33 U.S.C. §908(c)(1) for a 7.75% loss of use of his right arm at the weekly compensation rate of $240.63, such compensation to commence on March 23, 2000 and to continue for 24.18 weeks;

2. Upon conclusion of the payments for the Claimant's right arm, the Employer shall pay the Claimant permanent partial disability compensation benefits pursuant to 33 U.S.C. §908(c)(4) for a 7% loss of use of his left foot at the weekly compensation rate of $240.63 for 14.35 weeks;

3. Upon conclusion of the payments for the Claimant's right arm and left foot, the Employer shall pay the Claimant permanent partial disability compensation benefits pursuant to 33 U.S.C. §908(c)(2) for a 12% loss of use of each leg at the weekly compensation rate of $252.33 for a total of 70.12 weeks;

4. The Employer shall pay to the Claimant interest on any past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid;

5. The Claimant's attorney shall file, within thirty (30) days of the filing of this Decision and Order in the office of the District Director, a fully supported and fully itemized fee petition,

sending a copy thereof to counsel for the Employer who shall then have fifteen (15) days to file any objection; and

6. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts
DFS:dmd